Supreme Court, U.S.
FILED
FEB 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-701

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE NO. 19,
Petitioner,

v.

SOO LINE RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF OF PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF OF PETITIONER

On January 9, 1989 respondent Soo Line Railroad Company [hereinafter, "Soo"] served its brief in opposition to a petition by the International Association of Machinists and Aerospace Workers, District Lodge No. 19 [hereinafter, "IAM"], asking this Court to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review the sharply divided *en banc* decision of that court in *IAM v. Soo Line R.R.*, 850 F.2d 368 (8th Cir. 1988). Respondent Soo's brief in opposition raises several arguments to which petitioner submits a reply should be made. Therefore, petitioner

IAM respectfully submits this reply brief pursuant to Rule 22.5 of the Rules of this Court.

I. Contrary To The Soo Line's Eleventh Hour Argument, This Case Does Not Present Any Issue Concerning The Authority Of The Interstate Commerce Commission To Authorize A Railroad, Over The Objection Of The Employees' Duly Designated Representative, To Bargain Directly With Represented Employees

In its brief in opposition to this petition, respondent Soo asserts that both the IAM and the dissenting portion of the *en banc* Eighth Circuit have "fundamentally misunderstood" the Soo's "primary position" which is that "the ICC conditions *incorporate, and affirmatively authorize,* voluntary individual early retirements by senior employees as an alternative to involuntary furloughs of junior employees during a reduction in forces." Soo's Brief in Opp. at 2 (emphasis in original). That argument, which was raised by the Soo for the first time when it filed its petition with the Eighth Circuit for rehearing, is wrong both factually and legally.

Throughout this litigation, until it asked the full Eighth Circuit to hear its appeal *en banc*, respondent Soo asserted that the "separation program [which it was offering over the IAM's objection] . . . is outside the scope of any labor agreement with the IAM, [including the Employee Protective Agreement, and] is an additional benefit afforded to IAM employees . . . ." Joint Appendix in 8th Cir. No. 86-5355 [hereinafter, "J.A."] at 34. However, in its petition asking the Eighth Circuit to rehear the adverse decision by a panel of that appellate court, respondent Soo suddenly discovered that its direct dealing with IAM represented employees was "authorized" by the employee protective conditions which, it asserted, had been imposed by the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] under 49 U.S.C. § 11347. Petition For Rehearing served December 7, 1987, at 1. Respondent repeats that argument

here and states that the *ICC imposed* the employee protective conditions upon which it is now relying and that those conditions override any restriction which the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, might have placed on its ability to bargain directly with employees over the IAM's objections. Soo's Brief in Opp. at 14.

Contrary to respondent Soo's assertion (Soo's Brief in Opp. at 3, 14), the ICC did not impose employee protective conditions upon the Soo's acquisition of the operating properties of the Chicago, Milwaukee, St. Paul & Pacific Railroad [hereinafter, "MILW"] in February 1985, and consequently, respondent is wrong in looking to the ICC's authority to justify its disregard of its Railway Labor Act obligations. Rather, Section 5(b)(1) of the Milwaukee Railroad Restructuring Act of 1979 [hereinafter, "MRRA"], Pub. L. No. 96-101, 93 Stat. 736, 738, 45 U.S.C. § 904(b)(1), specifically placed the obligation upon the MILW Reorganization Court to impose the appropriate employee protections. Section 5(b)(1) provides in pertinent part that:

> [T]he bankruptcy court may authorize the sale or transfer of a line of the Milwaukee Railroad to be used in continued rail operations, subject to the approval of the Commission under paragraph (2) of this subsection. *In authorizing any such sale or transfer, the court shall provide a fair arrangement at least as protective of the interest of employees as that required under section 11347 of title 49 of the United States Code.*

45 U.S.C. § 904(b)(1) (emphasis added).

When the Soo's application to acquire the MILW was before the ICC, the Commission was also considering an application by another railroad (the Chicago & North Western Transportation Company) to acquire the MILW, and although the Commission concluded that the Soo's

application was consistent with the public interest and approved that application, it also concluded that the North Western's application was consistent with the public interest and it approved that application as well. Both applications were approved with the understanding that the reorganization court would choose which of the two competing bids to acquire the MILW should be accepted, although, at the court's request, the ICC stated that it preferred the Soo's application. As relevant here, the ICC also recommended that the reorganization court impose the *New York Dock* conditions as the appropriate protections for employees, regardless of which application the court accepted. *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 799 F.2d 317, 318-20, 328 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 2460 (1987). When the sale proposal came before the reorganization court in February 1985, the court approved the Soo's application pursuant to Section 5(b) of the MRRA, but rejected the ICC's recommendation that it impose the *New York Dock* conditions. Instead, the court accepted the "recommendation" of the Trustee, as seconded by the Soo, and imposed what are known as the "Appendix B" conditions;[1] as the court explained:

> I have looked over the recommendation of the Interstate Commerce Commission [recommending that

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[1] Respondent Soo is correct in asserting that the Appendix B conditions are comparable to the ICC's standard *New York Dock* employee protective conditions (Soo's Brief in Opp. at 4), but there are several crucial differences between the two forms of protective conditions. In particular, the Appendix B conditions did not prohibit the Soo and MILW from consummating the sale before they reached agreements with rail labor applying the general protections to this specific sale, and the Appendix B conditions applied to this sale only, rather than to any action taken pursuant to the court's order, as would have been the case if the *New York Dock* conditions had been imposed.

> the *New York Dock* conditions be imposed]. I can't say it is arbitrary or capricious but, on the other hand, I think it is advisory. In my opinion, the procedure that has been used by the Trustee in the other abandonments, particularly Appendix B to Order 406, or the master's recommendation, is the preferred one in this case. . . . I also find that they are equally protective of labor's interest as required by Section 11343 [*sic*] of the Interstate Commerce Act.

Transcript of Court's Ruling at 31-32, February 8, 1985, *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, N.D. Ill. No. 77 B 8999, *aff'd* 799 F.2d 317 (7th Cir. 1986).

As we explained before (Pet. at 4),[2] rail labor was dissatisfied with the Appendix B conditions and it accordingly noted an appeal from the reorganization court's order to the United States Court of Appeals for the Seventh Circuit. *See, In re Chicago, Milwaukee, St. Paul & Pac. R.R., supra,* 799 F.2d at 328-32. Moreover, while that appeal was pending, respondent Soo entered into collective bargaining agreements with most of its unions, including the IAM, to "replace" the Appendix B conditions. J.A. at 111. Those agreements, which are now called the "Employee Protective Agreements" (J.A. at 103), adopted the monetary benefits of the ICC's *New York Dock* conditions (J.A. at 105), but, as important

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[2] Respondent Soo asserts that the Employee Protective Agreement was entered into pursuant to Article I, Section 4 of the Appendix B conditions which required the parties to enter into "implementing agreements." Soo's Brief in Opp. at 4 n.1. That assertion is totally wrong, for an "implementing agreement" under the ICC imposed conditions is to apply the general terms of the ICC conditions to the facts of the particular transaction and to provide the basis upon which to select and assign the forces to perform the consolidated work. *New York Dock Ry.—Control*, 360 I.C.C. 60, 85, *aff'd* 609 F.2d 83 (2d Cir. 1979). Here, the Employee Protective Agreements "replaced" the Appendix B conditions and substantially modified those conditions; no "implementing agreement" may alter the substantive levels of the *New York Dock* conditions as did the Employee Protective Agreements.

here, those agreements did not carry with them any immunity from the Railway Labor Act's requirement that a rail carrier bargain with the duly designated representative of the employees, and with "no other." *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515, 548 (1937).

Since the Soo-IAM Employee Protective Agreement is a collective bargaining agreement which, at best from the Soo's point of view, traces its origin to the authority of the MILW Reorganization Court to impose a fair arrangement for the protection of employees (*e.g., Norfolk & Western Ry. v. Nemitz*, 404 U.S. 37 (1971)), this case does not in any way implicate the "exclusive and plenary" power of the ICC upon which our nation's railroads are relying so heavily today to avoid their Railway Labor Act obligations. *See*, Sup. Ct. No. 87-1888, *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Assoc.* Rather, the Appendix B conditions must be viewed as preserving the parties' Railway Labor Act obligations, for under the Railway Labor Act, both the MILW Trustee *and* the MILW Reorganization Court were "carriers" subject to all of the Railway Labor Act's obligations. 45 U.S.C. § 151 First; *Order of Railway Conductors v. Pitney*, 326 U.S. 561, 565 (1946). Moreover, the MILW Reorganization Court's authority was further clarified by Section 1167 of the Bankruptcy Code,[3] which provides

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[3] Section 77 of the Bankruptcy Act, 11 U.S.C. § 205 (1976), the statutory provision under which the MILW was reorganized, was repealed by Section 401(a) of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2682. That repeal, however, was not effective for any case commenced under Section 77 prior to the enactment of the Code, except that Section 1167 of the Code was made applicable to any case, such as the MILW reorganization, where a plan of reorganization had not been filed prior to enactment of the Reform Act. *Id.* at § 403(b), 92 Stat. 2683. Moreover, Section 1167 was a reenactment of Section 77(n) of the Bankruptcy Act, 11 U.S.C. § 205(n) (1976), and, thus, it affected no change in the reorganization court's powers or limitations with respect to the Railway Labor Act.

that "neither the court nor the trustee may change the wages or working conditions of employees of the debtor established by a collective bargaining agreement that is subject to the Railway Labor Act . . . except in accordance with section 6 of such Act . . . ." 11 U.S.C. § 1167.

Since the ICC's authority over rail transactions is not implicated by this case, and since the Soo is incorrect, as a matter of law, in implying that the MILW Reorganization Court could authorize the Soo to bargain directly with employees *over the objection of their duly designated representative*, it is clear that the Soo's reliance on any implied authority under the *New York Dock* conditions to engage in such direct bargaining, is misplaced. There is simply no express or implied waiver of the exclusive representation principle in the Employee Protective Agreement.

II. Respondent Soo's Arguments Show The Urgent Need For This Court To Review The Sharply Divided Decision Of The Full Eighth Circuit

When respondent Soo's arguments in opposition to the IAM's petition are examined, it becomes clear that there is a sharp division between petitioner and the Soo as to what is the controlling principle of law in this case. Indeed, the Eighth Circuit's *en banc* decision itself shows this, for besides disagreeing over which tribunal—the federal courts or the adjustment boards—had jurisdiction to determine if the Soo's conduct was unlawful, neither the majority nor the dissenters enunciated a clear rule of law as to what conduct is prohibited or authorized by the Railway Labor Act's exclusive representation principle.

According to the Soo, a railroad may bargain directly with represented employees on matters which do not *conflict* with existing collective bargaining agreements. Soo's Brief in Opp. at 2, 19. That principle of law, the IAM submits, may be the correct inquiry in determining whether an *employee* may set aside his individually ne-

gotiated agreement because it conflicts with a collective agreement. *E.g.*, *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 347 (1944). However, it is an entirely incorrect and irrelevant inquiry in determining whether *a carrier* may, *over the objection* of the employees' duly designated collective bargaining representative, engage in bargaining with individual employees. *E.g.*, *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944); *Order of Railroad Telegraphers*, *supra*, 321 U.S. at 346-47.

It is that latter inquiry which is relevant here, for the IAM has clearly and unambiguously objected to the Soo's engaging in direct negotiations with employees whom the IAM represents, concerning separation agreements. That objection raises related questions of whether *Medo Photo's* teachings apply to the Railway Labor Act as *Telegraphers* clearly indicates, and if so, whether the federal courts, or the adjustment boards, have jurisdiction to resolve a dispute over whether the parties have by agreement reserved the area of individual separation agreements for "individual contracting"—*i.e.*, whether there is a clear and express waiver of the exclusivity principle. The National Labor Relations Act's ban against such direct dealing is well understood (*e.g.*, *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967)), and there is no reason, we submit, why a similar clarity should not exist for the Railway Labor Act. *See*, Pet. at 18.

Because the question of whether a carrier may, over the objection of the employees' collective bargaining representative, bargain directly with its employees for separation agreements presents an issue which is so prevalent today, and so important to the orderly administration of the Railway Labor Act, petitioner submits that this Court should accept this case for review.

CONCLUSION

Petitioner IAM respectfully submits that its petition should be granted. Moreover, since the question presented is fairly simple, the IAM submits that this case is one in which the Court could shorten the normal briefing schedule to enable argument this term.

Respectfully submitted,

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